

General Information Letter: Paid leave-of-absence, if not deductible as paid under a qualified retirement plan, is determined to be compensation paid in this State under the same tests as used for ordinary wages or salary.

October 10, 1999

Dear:

This is in response to your letter dated August 23, 1999, in which you request a Private Letter Ruling (PLR). Because your request does not contain the information set forth in 2 Ill. Adm. Code 1200.110(b), the Department may not issue a PLR. Instead, the following General Information Letter (GIL) is designed to provide a general discussion of tax principles or applications, but is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c).

In your letter you have stated the following:

I am requesting clarification on the taxability of part of my 1998 wages by the State of Illinois. I have attempted to research and understand your definitions, and have found your website helpful. I also visited your office in the Thompson Building on Randolph Street in Chicago and spoke to one of your personnel. And, I attempted your 800 number numerous times only to consistently receive a busy signal.

Here are the facts of my circumstance:

On December 31, 1996, while working and living in xxxxxxxx, my position was eliminated and I was laid off by my employer, the xxxxxxxxxxxx xxxxxxxx xxxxxxxx xx xxxxxxxx, with retirement benefits. After accrued vacation pay in early 1997 was paid, I was placed on paid leave of absence until mid-1998. I was then on unpaid leave of absence until early 1999, my effective retirement date.

We are non-residents, having sold our Illinois home in the Spring of 1997 and moved out of and away from Illinois (winters are so much better 1500 miles southeast of xxxxxxxx). We also could not financially afford to remain in our residence after I was laid-off.

xxxxxxxxxxx continued to withhold Illinois income tax on both my paid leave of absence pay and payment of longterm incentive bonus, even though they correspond with me through our xxxxxxxx address. I believe this was done as the company did not have a similar operating division in xxxxxxxx. I will assume that the company required some accounting procedure to which they expense my pay, and therefore continued to use the xxxxxxxx office division code while making direct electronic deposits to my non-Illinois bank account.

I was unsuccessful in retrieving IITA Section 304(a)(2)(B) during my research of your website. My readings of what I was able to retrieve leads me to believe that compensation paid to nonresident employees is defined therein. I am not sure if I, as a person laid-off and subsequently retired, would also be covered by this statute. It is my understanding that a non-resident retiree pension is not taxed by Illinois.

While visiting your office in the Thompson Building, I came away with the belief that I was not subject to your income tax. I was instructed to file my '98 return with a letter of explanation. I have considered this advice but thought it would be more thorough for me to confirm in writing my understanding on how I should proceed.

I realize that my request for assistance is rather late in the normal filing cycle. I had hoped that while we were traveling through the Midwest and visiting in xxxxxxxx that I could clarify my confusion; unfortunately, some questions remain unanswered. I do understand that I have an automatic filing extension until October 15, 1999 for our '98 return (if I were subject to Illinois income tax, I would still receive a refund).

Please advise at your earliest convenience (a) either a final resolution [Private Letter Ruling] or (b) how I should file (i) either an additional extension or (ii) how I should file our return with the potential for a future amended return once our question of taxable income is answered.

RULING

Title 4, section 114 of the United States Code (4 U.S.C. §114) prohibits a state from imposing an income tax on the "retirement income" of a nonresident. For this purpose, the term "retirement income" means income from one of the sources below listed.

- 1) A qualified trust under section 401(a) of the Internal Revenue Code (IRC) exempt from tax under IRC section 501(a).
- 2) A simplified employee pension as defined in section 408(k) of the IRC.
- 3) An annuity plan described in section 403(a) of the IRC.
- 4) An annuity contract described in section 403(b) of the IRC.
- 5) An individual retirement plan described in section 7701(a)(37) of the IRC.
- 6) An eligible deferred compensation plan as defined in section 457 of the IRC.
- 7) A governmental plan as defined in section 414(d) of the IRC.
- 8) A trust described in section 501(c)(18) of the IRC.
- 9) Any plan, program, or arrangement described in section 3121(v)(2)(C) of the IRC, if the income is (1) part of a series of substantially equal periodic payments (not less frequently than annually) made for the life or life expectancy of the recipient (or the joint lives or joint life expectancies of the recipient and the designated beneficiary of the recipient), or a period of not less than 10 years; or (2) a payment received after termination of employment and under a plan, program or arrangement (to which such employment relates) maintained solely for the purpose of providing retirement benefits for employees in excess of the limitations imposed by one or more of sections 401(a)(17), 401(k), 401(m), 402(g), 403(b), 408(k), or 415 of the IRC or any other limitation on contributions or benefits in the IRC on plans to which any of such sections apply.

With respect to the allocation of compensation paid to nonresidents for Illinois

income tax purposes, section 302(a) of the Illinois Income Tax Act ("the IITA"; 35 ILCS 5/101 et seq.) states:

All items of compensation paid in this State (as determined under Section 304(a)(2)(B)) to an individual who is a nonresident at the time of such payment ... shall be allocated to this State.

IITA section 1501(a)(3) states that the term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. With regard to that definition, Illinois Income Tax Regulations section 100.3100(c) provides:

The name by which remuneration for services is designated is immaterial. Thus, salaries, fees, bonuses, commissions on sales or on insurance premiums, and pensions and retired pay are compensation within the meaning of the statute if paid for services performed by an employee for his employer.

Regulations section 100.3100(d) adds:

Remuneration for personal services constitutes compensation even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them, so long as such relationship existed when the services were rendered.

Section 100.3100(d) recognizes that where the right to a payment is acquired through the performance of services in the context of an employment relationship, the payment must be considered compensation under the IITA regardless of whether an employment relationship existed between the parties at the time of payment.

Illinois Income Tax Regulations section 100.3120 sets forth the rules to determine whether compensation is paid in Illinois. Section 100.3120(a)(1) states that compensation is paid in Illinois if:

- A) The individual's service is localized in Illinois because it is performed entirely within Illinois;
- B) The individual's service is localized in Illinois although it is performed both within and without Illinois, because the service performed without Illinois is incidental to the individual's service performed within Illinois; or
- C) The individual's service is not localized in any state but some of the service is performed within Illinois and either (i) the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within Illinois, or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in Illinois.

Further, regarding compensation paid for past service is paid in Illinois, section 100.3120(b) provides:

Where compensation is paid to a nonresident for past service, such

compensation will, for the purpose of determining whether and to what extent such compensation is "paid in" Illinois and is allocated to Illinois under IITA Section 302(a), be presumed to have been earned ratably over the employee's last 5 years of service with the employer ..., in the absence of clear and convincing evidence that such compensation is properly attributable to a different period of employment or that it was not earned ratably over the appropriate period of employment. Compensation earned in each past year will be deemed compensation paid in Illinois if the individual's service in such year met the tests set forth in [100.3120(a)].

Based upon the application of the provisions discussed above to the facts of your case, it is apparent that the amounts received by you as paid leave of absence and long-term incentive bonus are subject to Illinois income tax if such amounts constitute "compensation paid in Illinois" and are not "retirement income" under 4 U.S.C. §114. In determining whether those amounts constitute "compensation," if your right to receive them was acquired through the performance of service by you as an employee of xxxxxxxxxxx xxxxxxxxxxx xxxxxxxx xx xxxxxxxx, then the amounts constitute compensation even if actual payment did not occur until after the termination of your employment.

Accordingly, provided the amounts received by you are considered "paid in Illinois" under the rules set forth by Regulations sections 100.3120(a) and (b), and not "retirement income" under 4 U.S.C. §114, the same are subject to Illinois income tax. In that case, the amounts must be included on your IL-1040, Schedule NR (Column B, Line 7).

As stated above, this is a GIL that does not constitute a statement of Department policy, and it is not binding on the Department. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of 2 Ill. Adm. Code §1200.110(b).

Sincerely,

Brian L. Stocker
Staff Attorney - Income Tax